UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ALFONSO R. ARCHULETA	)	
	)	
v.	)	DA07528110372
	)	
DEPARTMENT OF THE AIR FORCE	)	
	)	
	)	

OPINION AND ORDER

Appellant has petitioned for review of an initial decision sustaining his removal from the position of aircraft refueling vehicle operator effective April 3, 1981. The charges were based on abuse of sick leave for taking more time than was reasonably necessary for doctor and dental appointments and deliberate subterfuge and misrepresentation in obtaining sick leave.1/ The presiding official, in an August 6, 1981 decision affirmed the agency action.

All of the charges in the instant case relate to appellant's use of sick leave after a transfer to the Fuels Management Branch of the agency. Almost immediately after the transfer, he began taking large amounts of sick leave for doctor and dental appointments. He was requested to, and did, with one exception,

1/ The gravamen of both charges is misrepresentation.

submit leave request forms whenever he requested leave. These requests were all approved by appellant's supervisor at the time of submission. However, the frequent requests for sick leave coupled with a subsequent report that appellant was seen at the American Legion Post on one of the days he was on sick leave led the agency to investigate. A study of appellant's dental attendance records revealed three cancelled appointments for which appellant was granted a total of 21 hours of leave and four other appointments for cleaning and/or filling teeth for which appellant took eight hours each. As to medical appointments, it is undisputed that on two occasions appellant requested eight and 25 hours of leave for blood pressure and EKG tests. In addition, one charged incident related to appellant's request for a total of 12 hours leave over a two-day period, while he only submitted a doctor's statement for one day.

Appellant's petition for review alleges that he was denied effective counsel, that the agency violated one of its own regulations, that the presiding official incorrectly interpreted the evidence with regard to one specification of the charge, and that the agency treated him more harshly than another employee who was charged with a similar offense.

With regard to the claim of ineffective counsel, appellant alleges that, despite his request, his representative failed to call any witnesses, including his doctors, to testify at

the hearing. Additionally, appellant asserts that his representative did not know how to proceed at several points during the hearing. Inadequate counsel, however, even if true, is not grounds for reversal as appellant is held responsible for the action or inaction of his counsel. See Bennett v. Navy, 2 MSPB 93, 99 (1980)

Appellant next argues that the agency committed harmful procedural error by violating Air Force regulations when it obtained the dental attendance records and the summary of appellant's dental treatment. The regulation in question, listed in the fitness-for-duty section of the Air Force regulations, requires that employee permission be obtained before requesting medical information from private institutions and doctors.2/ We concur with the presiding official's finding that no error was committed because appellant failed to show how this provision applies to the agency's use of dental logs in an appeal before the Board. Absent a showing that the provision in question required the agency to obtain appellant's authorization when it subpoenaed the dental records, the agency cannot be found to have committed procedural error.

2/ AFR 40-716

"Private medical information and records on an employee may not be obtained from private institutions or physicians without authority from the employee. The authority must be in writing, and provided to the private institute or physician to protect them from any liability that may arise."

Appellant's third contention, that the presiding official incorrectly interpreted the evidence with regard to his presence in the American Legion Building, is also without merit. Since this is a question of credibility due deference must be given to the assessment of the presiding official who was present to hear and observe the demeanor of the witnesses. See Weaver v. Department of the Navy, 2 MSPB 297 (1980). We find no error in the presiding official's credibility assessment and will not overturn it.

Finally, appellant argues that the penalty of removal is too severe for the charged conduct as another employee who violated leave and attendance policies was not removed, but received a two year probationary period. To make out a claim of disparate treatment the charges and the circumstances surrounding the charged behavior must be substantially similar. See Ramirez v. Department of the Treasury, DA07528110576 (January 4, 1983) at 4. Here appellant's case is clearly different from that of the other employee. Appellant was charged with several incidents of abuse of leave and misrepresentation to obtain leave. He denied all the charges. In contrast the other employee, who was charged with AWOL for an unspecified

number of days and threatening a supervisor, admitted to the charged offenses and also asserted a problem with alcohol as a mitigating factor. Appellant has not alleged the same or similar handicapping condition. Based on the above evidence a case of disparate treatment has not been established.3/

Moreover, the penalty imposed was not unreasonable. See Douglas v. Veterans Administration, 5 MSPB 313 (1981). Appellant's conduct was clearly serious. A federal agency cannot function efficiently if it cannot trust its employees to use leave properly. In addition appellant had a past disciplinary record of a reprimand for unsafe operation of a government vehicle and a three-day suspension for careless workmanship. Both offenses occurred within the last year of appellant's employment.

Balanced against these factors are appellant's largely satisfactory twenty-eight year service record and the fact that no abuse of leave was documented either prior to appellant's

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3/ It should be noted that this is the first time appellant has raised the issue of disparate treatment. Under 5 C.F.R. § 1201.115 the Board will not consider new evidence unless it is both new and material. In order to be material the evidence must be of sufficient weight "to warrant an outcome different from that ordered by the presiding official." Russo v. Veterans Administration, 3 MSPB 427, 429 (1980). Here we cannot determine whether the evidence is new. But, given our finding, it is not material under Russo, and it is insufficient to grant the petition for review.

assignment to the Fuels Management Branch nor in the seven months after his reassignment to the Office of General Equipment Manager.

The above listed factors, however, do not outweigh the magnitude of the offense. The record indicates that appellant was given more than 94 hours of leave on numerous occasions to attend medical and dental appointments, some of which were cancelled and the rest of which took only a few hours in total. While appellant asserts that he was, in fact, ill on each of these occasions, the record fails to support his assertion and, as the presiding official noted, appellant was granted leave on the basis of health appointments, not an illness. Moreover, although appellant informed his supervisors that working in the fuels branch made him ill, his actions in simply taking time off on approved leave, without evidence that leave was proper at the time it was taken, cannot be excused. Marty v. Department of Health and Human Services, 7 MSPB 700 (1981). Under these circumstances we find the penalty of removal was within the limits of reasonableness. Id. at 333.

Accordingly, the petition for review is DENIED.

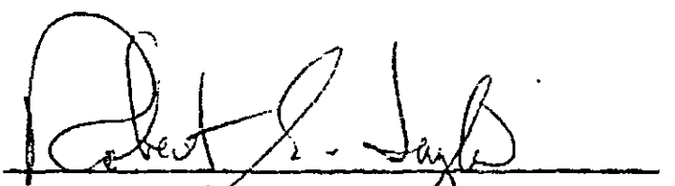
This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

Appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D. C. The petition for judicial review must be filed no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

AUG 24 1983

(Date)
Washington, D. C.



Robert E. Taylor
Secretary